Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

GUY C. MALBON, a/k/a Kippy,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIOTATI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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April 7, 1993

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court below erred in not granting the petitioner an evidentiary hearing on the issues raised in his 25 U.S.C. Section 2255 petition?

2. Whether the government breached its plea agreement with the petitioner, under which the petitioner pled guilty to Count 2 of a superseding indictment, charging violation of 21 U.S.C. Section 848?

3. Whether the petitioner was denied effective assistance of

counsel at sentencing, in violation of the Sixth Amendment of the Constitution of the United States?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GUY C. MALBON,

Petitioner,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United

States Court of Appeals for the Fourth Circuit was rendered on January 7, 1993, as an unpublished opinion, and it appears in the Appendix at A-2. The order of the United States District Court for the Eastern District of Virginia, denying petitioner's petition under Title 28 U.S.C. § 2255, was entered on December 16, 1991, and it appears in the appendix at A-18. The order of the United States District Court for the Eastern District of Virginia petitioner's Motion for a Reduction

of Sentence under Rule 35(b) of the Federal Rules of Criminal Procedure was entered on January 24, 1990, and it appears in the appendix at A-33.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case on January 7, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

1. Amendment VI to the United States Constitution provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. Title 28 U.S.C. § 2255 is set forth in the Appendix at A-36.

3. Title 21 U.S.C. § 848 is set forth in the Appendix at A-42.

4. Federal Rule of Criminal Procedure 35(b) is set forth in the Appendix at A-49.

5. Rule 8(a) of the rules Governing Section 2255 Proceedings for the United States District Courts is set forth in the Appendix at A-52.

STATEMENT OF THE CASE

This case comes before the United States Supreme Court on petition for a Writ of Certiorai from a decision of the United States Court of Appeals for the Fourth Circuit affirming the denial of the petition of Guy C. Malbon, hereinafter the "petitioner," under Title 28 United States Code § 2255 by the United States District court for the Eastern District of Virginia, Norfolk Division, the Honorable John A. MacKenzie, United

States District Judge, presiding. Petitioner originally had come before said District Court below under a criminal indictment, hereinafter termed the "superseding indictment," charging him and three other persons with various violations of Federal laws concerning the distribution of Marijuana and Cocaine, and Petitioner was specifically and personally charged with conspiracy to distribute marijuana and cocaine in violation of Title 21 U.S.C. §

846; engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848; distribution of marijuana in violation of 21 U.S.C. §841; interstate travel to facilitate the distribution of marijuana in violation of 21 U.S.C. §1952; attempted possession of marijuana with intent to distribute in violation of Title 21 U.S.C. §846; attempted possession of cocaine with intent to distribute in violation of 21 U.S.C. §846; unlawful use of a communication

facility to facilitate the distribution of marijuana in violation of 21 U.S.C. §843(b); possession with intent to distribute cocaine in violation of 21 U.S.C. §841; and bribery of a public witness in violation of title 18 U.S.C. §201.

On July 27, 1988, Petitioner Malbon pled guilty, pursuant to a plea agreement, to Count 2 of the superseding indictment, which count charged engaging in a continuing criminal enterprise in violation of

21 U.S.C. §848. On September 28, 1988, Petitioner was sentenced to a term of 14 years imprisonment and was fined in the amount of $100,000.00 by the Honorable John A. MacKenzie, United States District Court Judge. At sentencing, Petitioner was represented by Wayne Lustig, Esquire, now deceased. Petitioner, acting upon advise of counsel, did not file an appeal of his conviction or sentence. Before pronouncing sentence, the court reviewed and considered a pre-

sentence report and it also heard arguments of counsel. Because Petitioner's offense took place prior to November 1, 1987, the Federal Sentencing Guidelines mandated by the Sentencing Reform Act of 1984 did not apply to Petitioner's case.

On January 25, 1989, Petitioner filed, by counsel, a Motion for Reduction of Sentence under Rule 35(b) of the Federal Rules of Criminal Procedure. As grounds for his motion, the Petitioner

emphasized that his sentence was one as to which normal parole eligibility rules did not apply, and he stressed that he was incarcerated in a facility other than the one originally recommended by the court and that his pre-sentencing and post-sentencing cooperation had been very fruitful for the government in terms of arrests and convictions of major drug criminals. As an additional ground in support of his Motion for Reduction of Sentence, Petitioner called the attention of

the court to his health problems which prevented him from working at a regular job while in prison, thereby losing the opportunity to earn "extra good time.: The court denied petitioner's Rule 35(b) Motion on January 24 1990. See, Order (A-33).

Subsequently, petitioner, acting pro se, filed a petition pursuant to 28 U.S.C. §2255 in which he sought "specific performance" of his plea agreement and/or "resentencing" before a different

judge. Additionally, petitioner, both in his petition and in a separate motion, requested an evidentiary hearing prior to a ruling by the court on his petition under 28 U.S.C. §2255, and as a basis for entitlement to an evidentiary hearing, petitioner emphasized the need to develop evidence hearing upon disputed issues of fact which he viewed as material to his case. In his petition brought under 28 U.S.C. 2255, petitioner alleged that the

government breached the plea agreement in his case and that he had been denied effective assistance of counsel at sentencing. Mr. Malbon's 28 U.S.C. §2255 Petition was denied on December 16, 1991, without an evidentiary hearing having been held. See, Order (A-18). Petitioner timely filed his Notice of Appeal in the District court in accordance with Rule 4(a) of the Federal Rules of Appellate Procedure.

When Petitioner pled guilty to

Count 2 of a superseding indictment, in which he was charged with engaging in a continuing Criminal Enterprise, in violation of 21 U.S.C. §848, he was abiding by the terms of a plea agreement signed by him, his attorney, and the prosecuting attorney in which he was promised, among other things, that the office of the United States Attorney for the Eastern District of Virginia would inform the sentencing judge and the probation department of ... "3. The full nature and

extent of your client's cooperation, if any, with this office and the date when such cooperation commenced; and 4. all other information in its possession relevant to the sentence." (For the complete pleas agreement, please see the record below). At sentencing on September 28, 1988, the Court was informed in a general kind of way by the prosecutor, that the petitioner had "cooperated with the government in certain ways.: (See Transcript of proceedings of September 28,

1988, at P.17). Additionally, paragraphs 38 and 39 of the pre-sentence report prepared in Petitioner's case alluded briefly to some cooperation by the petitioner with the government. Petitioner's attorney did not object at sentencing when the prosecuting attorney gave the Court a minimal statement as to petitioner's cooperation.

It is petitioner's further assertion that an "oral agreement" was entered into between the

government and himself on or about August 10, 1988, a time after the guilty plea, but before petitioner's sentencing. The nature of this additional oral agreement was to the effect that the petitioner would be allowed to go home if petitioner continued to help one detective Randy Anderson. When petitioner received his 14 year sentence on September 28, 1988, no mention of this collateral "oral agreement" was made to the court by either the prosecuting attorney or by

petitioner's counsel. (See Transcript of Proceedings, September 28, 1988). A review of the record readily shows that there was no direct appeal taken by petitioner of his conviction or sentence. Likewise, it does not appear from a review of the court file that any evidentiary hearing was ever afforded to petitioner upon issues of fact raised in his petition under 28 U.S.C. §2255. (See Docket Sheet - Minutes in the record from below).

REASONS FOR GRANTING THE WRIT

I.

THE COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING ON THE ISSUES RAISED IN PETITIONER'S ORIGINAL 28 U.S.C. §2255 PETITIONS.

In his petition filed in the District court, the denial of which gives rise to this appeal, petitioner set forth allegations of fact as to which the record of proceedings in his case is completely devoid. Nowhere in the transcripts of the proceedings held in open court or in any of the

pleadings or other documents filed in petitioner's case is there any mention, one way or the other, of any "oral agreement" between him and the government. That there was a dispute as to the existence of such a collateral agreement after the filing of his petition is clear from affidavits filed with his Motion by the petitioner. Under such circumstances the court was obligated, at the least, to inquire by way of a hearing to attempt to determine by evidence the true facts

as to petitioner's factual contention.

Another aspect of significant factual dispute relates to whether the court was advised of the"full nature and extent" of petitioner's cooperation with the government pursuant to the terms of his plea agreement and whether the court was advised of "all other information in its possession relevant to the sentence" as provided in the plea agreement. The petitioner contends that the court was not fully advised

of the nature and extent of his cooperation, and to give substance to his contention, he has produced with his petition affidavits, news releases, news paper clippings, as well as a detailed recitation of the things he did to cooperate with the government, at treat personal risk to himself and to his family. Obviously, the government would contend that its bare statement at sentencing that petitioner had "cooperated with the government in certain ways", coupled with the

contents of the pre-sentence report, was adequate. Yet, petitioner respectfully submits that only by conducting a hearing into what cooperation he actually gave could the court determine whether it had been fully informed as to the nature and extent of petitioner's cooperation at the time it imposed sentence, or even at the time it denied petitioner's rule 35(b) petition. Also, petitioner would note that it was the prosecutor's obligation to fully inform the Court

of petitioner's cooperation and not the responsibility of the probation officer who prepared the pre-sentence report.

In the case of Townsend v. Sain, 372 U.S. 293, 314 (1963), this Court articulated the principle for habeas corpus cases that an evidentiary hearing must be held when the facts are in dispute and it appears that the habeas applicant did not receive a full and fair evidentiary hearing in a State Court, either in a trial or in a

collateral proceeding. The standards for 28 U.S.C. §2255 hearings are essentially the same as for evidentiary hearings under a habeas petition, except that the previous federal fact-finding proceeding is in issue, rather than the State's. (See, 1976 note of the Advisory Committee to rule 8 of the "Rules Governing Proceedings in United States district Courts Under Section 2255 of Title 28, United States Code"). Indeed, this court has held that the grounds for relief

under 28 U.S.C. §2255 are equivalent to those encompassed by 28 U.S.C. §2254, which applies to Federal habeas corpus actions of state prisoners. Davis v. United States, 417 U.S. 333 (1974); See also, Robson v. United States, 526 F. 2d 1145 (1st Cir. 1975).

A sentencing court has discretion to ascertain whether a claim is substantiated, so as to merit a full evidentiary hearing under 28 U.S.C. §2255. Sanders v. United States, 373 U.S. 1 (1963).

Yet, it is equally clear that unless the allegations in a 28 U.S.C. §2255 petition are vague, conclusory, or palpably incredible, a hearing is required in instances where the controverted factual issues cannot be determined by the motion itself, by the trial court's files and records, or by the district judge's personal knowledge or recollection. Machibroda v. United States, 368 U.S. 487 (1962); Del Piano v. United States, 362 F. 2d 931 (3rd Cir, 1966).

Significantly, the statutory language of 28 U.S.C. §2255 provides a clear standard that delineates when a hearing is required. According to that language, "...Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect

thereto." In Fontaine v. United States, 411 U.S. 213 (1973), this Court directed a hearing on a 28 U.S.C. §2255 petition because of the high degree of assurance required to dispense with the hearing under this statutory "conclusively show" standard.

Considering all of the authorities cited above, petitioner respectfully submits that he did not receive a full and fair evidentiary hearing of significant facts that are in dispute in his case as

required by Townsend, supra. Moveover, Mr. Malbon's petition on its face would seen to call for an evidentiary hearing under Machibroda, supra, because its allegations, far from being vague, conclusory, or palpably incredible, are focused, well-supported, and plausible, and to the extent they were not fully made known to the District Court during appellant's sentencing, it cannot be said they are determinable completely from the motion itself, by the trial court's

files and records, or by the judge's personal knowledge. Only by means of a full and fair hearing can it be determined what was not said or otherwise made known to the court at appeallant's sentencing.

Finally, applying the facts of petitioner's case to the standard of the statutory language of 28 U.S.C. §2255, it cannot be said that the motions, files, and records of petitioner's case conclusively show that he is entitled to no relief. To the contrary, the motions, files

and records of petitioner's case tend to shown that the sentence is subject to collateral attack, this justifying a hearing to which petitioner has thus far been denied.

II

THE GOVERNMENT BREACHED ITS PLEA AGREEMENT WITH PETITIONER UNDER WHICH PETITIONER PLED GUILTY TO COUNT 2 OF THE SUPERSEDING INDICTMENT.

A. THE WRITTEN PLEA AGREEMENT

The written plea agreement made between the government and

petitioner provided for petitioner to plead guilty to Count 2 of the superseding indictment, which charged Engaging in a Continuing Criminal Enterprise in violation of 21 U.S.C. Section 848. For its part, the government became obligated to, among other things, inform the sentencing judge and the probation department of the full nature and extent of petitioner's cooperation, if any, with the United States Attorney's Office and the date when such cooperation

commenced. Further the government became obligated to inform the sentencing judge and the probation department of "all other information in its possession relevant to the sentence." That petitioner reasonably relied upon the government's promises is beyond dispute and is amply demonstrated by reference to the docket sheet-minutes and the court file as a whole. Yet, the government failed in its obligation to give full and complete information to the Court

regarding appellant's "cooperation," and this failure, the petitioner submits, operated to petitioner's prejudice because of the very negative impressions about the petitioner created by the charge itself that were not in the least dispelled, as arguably they would have been had the government lived up to its obligation under the plea agreement. It was not enough for the Court to be told in a general way that the petitioner had "cooperated in certain ways" (and

that the pre-sentence report had a few lines in paragraphs 38 and 39 regarding petitioner's cooperation). These bits of information, petitioner submits, were inexcusably general and did not give the court an accurate picture of what petitioner had actually done in cooperating with the government, so as to carry out his part of the bargain under the plea agreement. The government should be held to meticulous standards of both promise and performance, where plea

agreements are concerned. Correale v. United States, 479 F. 2d 944, 947 (1st Cir., 1973).

Against the vague and general statements of cooperation which the government provided to the Court, some of the actual facts of petitioner's cooperation stand out in marked contrast and speak volumes for mitigation in the sentence which was meted out to petitioner by a judge who was kept ignorant of those facts. At the time of his sentencing, petitioner had undergone

numerous debriefings by government agents, wherein they learned of involvement of individuals, events, amounts of drugs, and dates in the alleged drug conspiracy. Also, during the investigation, between the time of his plea and his sentencing, petitioner informed the investigators that Fidel Escamilla was planning to murder his girlfriend, Brenda Youngblood, to prevent her cooperation with law enforcement authorities. Additionally the petitioner helped

to organize a drug transaction that resulted in the arrest and conviction of three (3) individuals who were carriers of cocaine in the Escamilla organization. Finally, after his sentencing on September 28, 1988, petitioner's numerous activities of cooperation ultimately resulted in the arrest and conviction of Fidel Escamilla, this despite numerous threats directed by Escamilla upon the health and well-being of petitioner's family and one Cindy Campbell. See also,

petitioner's 28 U.S.C. 2255 petition filed in the United States District Court which may be found with the record of this matter.

Where a defendant's guilty plea rests in any significant degree on a promise or agreement of a prosecutor, so that it can be said to part of the indictment or consideration, such promise must be fulfilled, and the fulfillment of the promise becomes a necessary predicate to a conclusion of voluntariness of the plea.

Santobello v. New York, 404 U.S. 257, 262 (1971); Mabry v. Johnson, 467 U.S. 504 (1984); United States v. Harvey, 791 F. 2d 294 (4th Cir., 1986); Plaster v. United States, 720 F. 2d 340 (4th Cir., 1983). In petitioner's case, therefore, the government's failure to fully inform the court of the nature and extent of petitioner's cooperation undermines the voluntariness of his plea and requires that he be allowed to plead anew or, in the alternative, that he be resentenced

with the benefit of having the court fully and fairly advised of the nature and extent of his efforts of cooperation under the plea agreement. Indeed, it is this "specific performance" of the government's obligation under the terms of its plea agreement with petitioner that petitioner now seeks.

The case of United States v. Fisch, 863 F. 2d 691 (9th Cir., 1988) is remarkably like that of petitioner. In Fisch, a plea

agreement between Fisch and the government required the government to inform the court at sentencing of all of Fisch's cooperation with authorities. At sentencing, Fisch's attorney referred generally to several acts of cooperation by Fisch, much as did Mr. Lustig in appellant's case. The prosecutor, on the other hand, while not directly responding, acknowledged that Fisch had been "cooperating in helping prosecute the co-conspiratiors..." In vacating and

remanding for resentencing, the court held that the prosecutor's bare statement that Fisch had cooperated, without suppling any details about Fisch's cooperation, did not fulfill the government's obligation under the terms of the plea agreement. Likewise, in the instant case of the petitioner, the prosecutor's bare, general statement regarding petitioner's cooperation was not compliance with the plea agreement by the government .

Another case with similar

result is that of United States v. Martin, 799 F. 2d 184 (3rd Cir., 1986), except that in Martin the government did not in the least advise the court of Martin's cooperation, as it was obligated to do under the terms of its plea agreement with Martin. In argument, the government contended that its failure to abide by the terms of the plea agreement and inform the court of Martin's cooperation was harmless error, since the court knew of Martin's cooperation, in that the

judge who sentenced Martin was the same judge who presided at the trial of a co-defendant. The court, citing Santobello v. New York, supra, ruled that the sentence had to be vacated because of the breach in the plea agreement and that the case had to be remanded to the district court for it to determine whether to conform the sentence to the plea agreement or allow withdrawal of the plea. Martin, at 187. See also, United States v. Brown, 500 F. 2d 375 (4th Cir.,

1974).

The case of United States v. Brody, 808 F. 2d 944 (2nd Cir., 1986) is another case in which a prosecutor was held to have breached a plea agreement by mischaracterizing the nature of a defendant's cooperation, when he was required to inform the sentencing judge of the nature and full extent of the defendant's cooperation in unrelated investigations. Although the court in Brody ruled that any possible prejudicial effect caused

by the prosecutor's failure to communicate the full extent of defendant's cooperation to the sentencing court was cured when the sentencing judge was presented with additional facts of defendant's cooperation, Brody is distinguishable from petitioner's case by the very fact that Mr. Brody got a hearing on his motion for reduction of sentence. A search of the record and court file in petitioner Malbon's case leads one to the inescapable conclusion that

he did not get a hearing even on his Rule 35(b) Motion to Reduce Sentence. See also, United States v. Williams, 656 F. 2d 357 (8th Cir., 1981), which is also similarly distinguishable from petitioner's case, because petitioner had no comparable hearing or proceedings on his Rule 35(b) motion.

In its order ruling against petitioner's Petition under 28 U.S.C. Section 2255, the District Court cited United States v. Dail, 4th Cir. Ct. No. 89-5761, decided

January 8, 1991, an unpublished opinion, as authority for taking an approach of looking at the totality of the government's efforts to inform the sentencing judge. Yet the record must have revealed far more in the way of such efforts in Dail, because petitioner can only assume that the probation office was told something of his cooperation. In the instant case of petitioner Malbon, nothing showed to the court of that information, however, beyond the bare bones statements of

paragraphs 38 and 39 of the pre-sentence report. Nor, from the Court's order, can it even be assumed that the sentencing judge was made familiar in any way with the facts of petitioner's cooperation beyond what the prosecutor stated on the record and what appeared in the pre-sentence report. These facts take petitioner's case beyond the ambit of Dail and cause it to deserve a new look by the District Court in the form of a re-sentencing.

B. THE VERBAL AGREEMENT

The petitioner contends that he was promised by government agents on or about August 10, 1988, that if he continued to assist in the capture of Fidel Escamilla, he would be allowed to "go home." Concededly, this promise was made to petitioner after he had already pled guilty, and ordinary principles of contract law as well as the fact that it was not in writing would seem to make it unenforceable. Nevertheless, the fact of this additional promise was

an inducement to petitioner to cooperation at some greater risk to himself, his fiancee, and his family than he might otherwise been willing to run in order to assist the government. Accordingly, the additional promise, together with the additional or extra measure of cooperation that it elicited, was a factor relevant to petitioner's sentencing, and it should have been made known to the court at sentencing, as provided in the plea agreement. By not so advising the

court of this "verbal agreement," whereby the petitioner was promised by Detective Randy Anderson that he would be allowed to "go home" in exchange for this continued cooperation toward the arrest and conviction of Fidel Escamilla, the government breached the plea agreement. For the reasons hereinbefore stated, the petitioner should be granted a re-sentencing hearing at which this important relevant fact could be developed.

III

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Sixth Amendment of the Constitution of the United States contains a guarantee of the assistance of counsel to the accused in all criminal prosecutions. This provision has been construed to be a right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759 (1970). In evaluating allegations of "ineffective"

assistance of counsel, this Court has articulated a two part test. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and second, that there is a reasonable probability that the result of the proceeding would have been different, but for counsel's performance. Strickland v. Washington, 466 U.S. 68 (1984). Brown v. Dixon, 891 F. 2d 490 (4th Cir., 1989), Cert. denied 495 U.S. 953 (1990).

Petitioner asserts that his attorney during the trial and sentencing phases of his case, Mr. Wayne Lustig, now deceased, proved "ineffective" at the sentencing hearing and in failing to file a direct appeal.

As noted herein, the written plea agreement between petitioner and the government provided for the government to inform the probation department and the sentencing court of the full nature and extent of petitioner's cooperation. When the

government breached this aspect of the agreement by only half-heartedly informing the court of petitioner's cooperation, Mr. Lustig failed to note his objection. Had he objected at that juncture, as minimally reasonable and objective standards would dictate, the government would have been required to fully make petitioner's cooperation known, both in nature and extent, thereby assuring the petitioner of the benefit of his bargain in entering into the plea agreement. It is,

therefore, likely that petitioner's sentence would have been somewhat less than the fourteen (14) years he received, without possibility of parole.

Petitioner states that he requested Mr. Lustig to file a direct appeal, but that Mr. Lustig did not do so, saying that to appeal would possibly subject petitioner to a life sentence. Petitioner now contends that he was not properly advised that he would not necessarily open himself to a

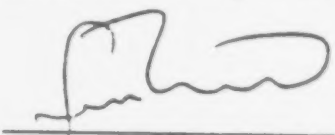
possible life sentence if he appealed, but that he might obtain "specific performance" of his plea agreement, instead. That is, petitioner maintains that he would hope to be awarded a re-sentencing hearing as a result of a direct appeal, with the provision that the government would be required to fully and fairly inform the court of the nature and extent of his cooperation. Petitioner respectfully submits that it is reasonably probable that a different

result would have occurred had Mr. Lustig pursued the filing of a direct appeal, even if the sentence had been ultimately reduced by only a few years, because the nature and extent of his cooperation would have warranted a lesser sentence.

CONCLUSION

For the reasons set forth above, the petition for writ of certioriari should be granted.

Respectfully submitted,



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April 5, 1993

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. NO: 92-6060

GUY C. MALBON, a/k/a KIPPY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk, John A. MacKenzie, Senior District Judge.

(CR-88-1-N, CA-91-608-N)

Submitted: September 30, 1992

Decided: January 7, 1993

Before NIEMEYER, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

James O. Broccoletti, ZOBY & BROCCOLETTI, Norfolk, Virginia, for Appellant. Richard Cullen, United States Attorney, Alexandria,

Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Guy C. Malbon appeals from the district court's order refusing relief under 28 U.S.C. §2255 (1988). Finding no merit to Malbon's claims, we affirm.

A federal grand jury indicted

Malbon and three other named Defendants on twenty-two counts for a drug smuggling scheme. In 1988, Malbon pled guilty in federal district court, pursuant to a written plea agreement, to one count pursuant to a written plea agreement, to one count of engaging in a Continuing Criminal Enterprise, in violation of 21 U.S.C. §848 (1988). Under the version of the statute in effect at that time Malbon faced a mandatory minimum prison sentence of ten years. The

plea agreement specified imposed a fourteen-year sentence and fined Malbon $100,000. Malbon never appealed his sentence, though he did move unsuccessfully in the district court to reduce his sentence pursuant to the former Fed. R. Crim. P. 35(b).

A condition of the plea agreement was the prosecutor's promise to inform the sentencing judge and the probation department of the full nature and extent of Malbon's cooperation with government

agents and the date when the cooperation began. At the sentencing hearing, the prosecutor said "I would just state for the record, because it is called for in the plea agreement, that Mr. Malbon did cooperate with the government in certain ways."

Malbon argues on appeal that this statement was insufficient and breached both the written plea agreement and a subsequent oral plea agreement and that his counsel provided ineffective assistance.

The prosecutor did inform the sentencing court and the probation department of Malbon's assistance to the United States Customs Service in luring three drug couriers to Virginia Beach. That information was in the probation report given to the district court. The findings of the district judge, who was also the sentencing judge in Malbon's case and the cases of his co-Defendants, that there were no oral agreements and that the government did not breach the written plea agreement

were not clearly erroneous.

The parties specifically agreed in the written plea agreement that changes or additions to the plea agreement would be in writing and signed. Affidavits from the prosecutor and a customs agent disclose there was no agreement to release Malbon if he aided government agents in apprehending drug couriers. Moreover, statements made by Malbon at his sentencing belie the claim of an oral plea agreement. C. Blackledge v.

Allison, 431, U.S. 63, 73-74 (1977)(prisoner may not ordinarily repudiate statements made to judge at plea hearing).

Malbon claims his counsel provided ineffective assistance at the sentencing hearing when he failed to object to the prosecutor's bare statement on cooperation and when he failed to file an appeal. To prevail on his claim of ineffective assistance of counsel Malbon must show that (a) his counsel's performance fell below an

objective standard of reasonableness and (b) a reasonable probability the result of the proceeding would have been different but for counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). The Supreme Court has defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Id. at 694. A court need only determine a petitioner has made an insufficient showing regarding either the performance or prejudice

standard to dismiss the claim. Id. at 697.

Here, Malbon cannot show deficient conduct or prejudice at the sentencing hearing. The district judge was fully informed of Malbon's cooperation with the government. Therefore, there was no basis for counsel to object to the prosecutor's description of his cooperation. There is also no reasonable probability that a different outcome would have resulted from an objection.

Moreover, the evidence in the record on appeal does not show that Malbon told counsel that he wanted to appeal and that counsel refused to do so against Malbon's wishes. Malbon states in his affidavit that he "talked to" counsel about appealing his sentence but that counsel said "No," that Malbon could get life imprisonment. This affidavit indicates nothing more than a discussion of an appeal and the advice given by Malbon's attorney. Malbon does not allege

that his attorney ignored instructions to file an appeal. Further, the evidence in the record does not show that Malbon wanted to reverse his conviction or go to trial. Counsel filed a motion to reduce sentence under Rule 35(b). This course does not appeal professionally unreasonable in view of Malbon's expressed wish to reduce his time of incarceration. Therefore, his claim of ineffective assistance for failing to file a notice of appeal is meritless.

Malbon also argues an appeal that the district court should have granted him an evidentiary hearing on factual disputes over the purported oral plea agreement and the extent of the government's efforts to inform the sentencing court of Malbon's cooperation with the authorities. Evidentiary hearings are not required in every §2255 proceeding. See Rule 8(a) of the District Court Rules Governing Section 2255 Cases. There was sufficient information in the

record, transcripts, and affidavits for the district judge to resolve these disputes. See Fontaine v. United States, 411 U.S. 213, 215 (1973).

Finding no merit in these arguments, we affirm the district court's dismissal of Malbon's §2255 petition. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process. AFFIRMED

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 92-6060
CA-91-608-N
CR-88-1-N

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GUY C. MALBON, a/k/a Kippy

Defendant - Appellant

Appeal from the United States

District Court for the Eastern District of Virginia at Norfolk

This case was heard by the Court on the record from the District Court.

The Court affirms the judgment of the District Court.

/s/ Bert M. Montague

CLERK

Filed: January 7, 1993

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF

VIRGINIA

Norfolk Division

GUY C. MALBON,

Petitioner,

v. CIVIL ACTION NO.

91-608-N

UNITED STATES OF AMERICA,

Respondent. CRIMINAL ACTION

NO: 88-1-N

ORDER

Petitioner, a federal prisoner

convicted of operating a continuing criminal enterprise in violation of 21 U.S.C. §848, has petitioned this Court under 28 U.S.C. §2255, alleging that his sentence was illegally imposed. Petitioner alleges that the United States breached its plea agreement and that he received ineffective assistance of counsel.

Petitioner asserts that the United States Government breached its plea agreement in which it promised that the United States

Attorney's office "will inform the sentencing judge and the probation department of . . . [t]he full nature and extent of [petitioner's] cooperation, if any, with this office and the date when such cooperation commenced." Memorandum of Law in Support of Petitioner's 28 U.S.C. Section 2255 Petition, Exhibit A at 2 [hereinafter Petitioner's Memorandum]. At the sentencing hearing, counsel for the United States advised the Court that petitioner "did cooperate with the

government in certain ways." Transcript of Sentencing Proceedings at 17. Petitioner objects to this statement as insufficient.

This Court, well aware of petitioner's involvement with others in the conspiracy to distribute large amounts of marijuana, was also made aware of petitioner's efforts to cooperate. The presentence report explained to the Court that petitioner played "an essential role in luring three couriers of Escamilla to Virginia Beach, leading

to their arrests on cocaine charges" and that petitioner had "undergone debriefings by Government authorities on a number of occasions." Petitioner's Memorandum, Ex. C. The Government, therefore, fully informed this Court of the nature of petitioner's cooperation, and thus adhered to its agreement.

In a similar case the United States entered into a plea agreement agreeing to make the trial court aware of the "'full nature and

extent' of the appellant's cooperation." United States v. Dail, No. 89-5761, slip op. at 2 (4th Cir. Jan. 8, 1991). In Dail, the Fourth Circuit noted that the United States had met its burden of providing the Court with knowledge of the "full nature and extent" of appellant's cooperation through the presentence report, through the sentencing memorandum, and through related cases. In addition, as occurred here, appellant had detailed his own cooperative

efforts. The Fourth Circuit noted that the plea agreement did not specifically state how the United States would make the information available to the sentencing judge, but held that the government had sufficiently complied with the agreement. Id. at 5. The approach in Dail was to look at the totality of the government's efforts to inform the sentencing judge. In our petitioner's case, the Court was fully informed at the time of sentencing of the extent of

petitioner's cooperative efforts, and therefore, the United States Attorney's office met its contractual burden.

Petitioner additionally claims that he entered into a verbal agreement with a member of the United States Attorney's office on August 10 or 11 of 1988 in which an Assistant United States Attorney promised to "get him home" if he helped with the investigation of others. Petitioner's Memorandum at 9. Petitioner's plea agreement

clearly states: "No additional promises, agreements and conditions . . . have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties." Petitioner's Memorandum, Ex. A at 4. Petitioner clearly has no claim that the government has breached a verbal agreement.

Finally, petitioner claims ineffective assistance of counsel in violation of his Sixth Amendment rights. The standard articulated in

Strickland v. Washington, 466 U.S. 668 (1984), governs this claim. The law under Strickland requires petitioner first to show that counsel's representation fell below an objective standard of reasonableness. Id. at 687-91. Secondly, petitioner must show "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Petitioner claims that his attorney was ineffective when he

failed to object to the Assistant United States Attorney's lack of elaboration regarding petitioner's cooperative efforts. He contends that an objection would have been instrumental in forcing the government "to abide by the plea agreement terms." Petitioner's Memorandum at 14. No reasonable probability of a different outcome exists, however, because the Court was fully informed of the extent of petitioner's cooperation at the time of sentencing. Under Strickland, if

no prejudice to the client exists, no inquiry into counsel's performance is necessary. Strickland, 466 U.S. at 697.

Petitioner asserts a similar ineffective assistance of counsel claim with respect to his attorney's failure to appeal his sentence. By filing a direct appeal of his sentence, as counsel aptly advised him and petitioner readily admits, petitioner risked the possible imposition of a life sentence. Informed of his client's

dissatisfaction with his sentence, petitioner's attorney filed a motion under F.R.Crim.Pro. 35(b) seeking to have petitioner's sentence reduced because of post-sentencing aid given to the government. Petitioner's Memorandum, Ex. H. This decision was not objectively unreasonable in light of petitioner's goals. An attorney generally retains discretion to decide the means by which his client's case should be pursued, while the client retains authority over the purpose of

representation and a right to be consulted. See Brown v. Dixon, 891 F.2d 490, 500 n. 20 (4th Cir. 1989), cert. denied, 58 U.S.L.W. 3740 (1990). Thus, petitioner has not been denied effective assistance of counsel.

For the foregoing reasons, this Court DENIES petitioner's request for relief under 28 U.S.C. §2255.

The Clerk is directed to send copies of this order to petitioner and to Robert W. Wiechering, Assistant United States Attorney,

Room 401, 600 Granby Street, Norfolk, Virginia 23510.

It is so ORDERED.

Entered December 16, 1991 by John A. MacKenzie, Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

UNITED STATES OF AMERICA,

v. CRIMINAL NO. 88-1-N

GUY C. MALBON, A/K/A KIPPY,

Defendant.

ORDER

The Court is in receipt of a Motion for Reduction of Sentence, pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, from counsel for the defendant. The

said motion was properly filed in the Clerk's Office on January 25, 1989.

After reviewing the file and Motion for Reduction of Sentence, the Court finds no reason to disturb or reduce the sentence imposed on September 28, 1988.

It is ORDERED that the Motion for Reduction of Sentence is DENIED.

The Clerk is directed to forward copies of this Order to Robert W. Wiechering, Assistant United States Attorney, Room 401,

600 Granby Street, Norfolk, Virginia 23510, and to Wayne Lustig, Esquire, Guy, Cromwell, Betz & Lustig, P.C., Pembroke One Building, Fifth Floor, Virginia Beach, Virginia 23462, counsel of record for the defendant.

Entered January 24, 1990, by John A. MacKenzie, Judge

APPENDIX E

28 U.S.C., §2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the

maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine

the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge

the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from the

final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has filed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective

to test the legality of his detention.

(June 25, 1948, ch 646, § 1,62 Stat. 967; May 24, 1949, ch 139, § 114, 63 Stat. 105.)

APPENDIX F

21 U.S.C. § 848. Continuing criminal enterprise.

(a) Penalties; forfeitures. (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one

or more prior convictions of him under this section have become final, he shall be sentenced to a term if imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States -

(A) The profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) "Continuing criminal enterprise" defined. For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if -

(1) he violates any provision of this title or title III the

punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this title or title III -

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or

resources.

(c) Suspension of sentence and probation prohibited. In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 of the United States code and the Act of July 15, 1932 (D.C. Code, secs. 24-203-24-207), shall not apply.

(d) Jurisdiction of courts. The district courts of the United

States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a)) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

(Oct. 27, 1970, P.L. 91-513,

Title II, Part D, § 408, 84 Stat. 1265.)

APPENDIX G

Rule 35. Correction or Reduction of Sentence. (From the Federal Rules of Criminal Procedure)

(b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after

entry of any order or judgment of the supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

*__NOTE__: Amendments to this Rule, effective November 1, 1987,

are not included. This was the reading of Rule 35(b) as it applied in petitioner's case.

APPENDIX H

Rule 8. Evidentiary Hearing.

(From the Rules governing Section 2255 Petitions in District Courts)

(a) Determination by Court. If the motion has not been dismissed at a previous state in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary

hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.